Property Occupations Bill 2013
Submission 002

17 December 2013

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

Dear Sir/Madam,

Clauses 7 and 8 of the Property Occupations Bill 2013

1. Summary

The Shopping Centre Council of Australia (SCCA) wishes to comment on Division 2 (Exemptions) of the *Property Occupations Bill 2013* ("the Bill"), which exempts from the Act both 'related entities' (Clause 7) and 'large scale non-residential property transactions or holdings'. We strongly support this correction of an 'historical accident' which will reduce costly red-tape on Queensland property businesses (see Appendix 2.)

At present anyone involved in buying, selling, leasing or managing property for someone else must be licensed and comply with the *Property Agents and Motor Dealers Act 2000* ("PAMDA"), even if they are a subsidiary or a related entity to the property owner. The aim of the PAMDA is to protect property owners in their dealings with property agents (property managers). This is continued in the Bill.

This is valid for residential property owners and may be valid for some small commercial property owners where the 'consumers' (i.e. property owners) are individuals and small businesses with limited knowledge of real estate practices and who may be vulnerable to property agents. It is not valid for the sophisticated segment of the commercial property industry where the 'consumers' being protected are large national (and multinational) professional property-owning entities which are more than capable of looking after their own interests. (Individual investors in these entities are protected by Commonwealth regulation of companies, trusts and managed investments.)

The Act's requirements impose significant costs on these professional property owners and managers, for no benefit to these owners, or to their tenants or to the public more generally. These include prescriptive rules on the signing of cheques and the writing of receipts; the collection and banking of rents; and the maintenance of trust accounts. In addition, staff must also undertake prescribed professional development courses which provide no relevant professional training for shopping centre staff or commercial office staff. We have accurately assessed these costs to Queensland commercial property owners as being more than $2.4 million a year (see Appendix 1).

The Bill exempts (in Clause 7) property agents who are managing property on behalf of 'related entities' since no proper agency relationship exists between the owner and the agent. The Bill also exempts (in Clause 8) 'large property owners' who do not need, nor want, the protections of licensing and regulation. These owners fully understand the risks that may be involved in commercial property transactions and have the ability, through legal and commercial avenues, to protect themselves against transactions which might go wrong. These exemptions will reduce the regulatory burden on Queensland property businesses and free owners and managers from costly and unnecessary red tape. This reform would also generate savings for the Government by reducing the staffing resources necessary to administer and enforce the new Act. Most importantly, this reform would not involve risks to tenants or to the wider community in Queensland. We elaborate on this in sections 2, 3 and 5 of this submission.

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2. Clause 7. Exemption for entities which manage property on behalf of related entities

People or entities which directly sell, manage or lease their own commercial property do not need to be licensed since there is no agency relationship. However when, because of the organisational structuring of large businesses, the buying, management or leasing of such property is not performed directly, but through a related entity, such agents are required to be licensed, even though there is still no proper agency relationship between the owner and the manager.

It is obviously absurd, and was never the intention of the PAMDA, that employees of, say, Westfield Shopping Centre Management are required to be licensed when managing or leasing shopping centres on behalf of the Westfield Group or that employees of AMP Office and Industrial must be licensed when managing and leasing offices on behalf of AMP Capital Investors. This is the bizarre situation that exists today, however.

The need for an exemption for 'related parties' has been recognised for many years. The National Competition Policy review of the Victorian *Estate Agents Act,* found that *"the costs of the current provisions [of the regulation of the Estate Agents Act] reserving property management, commercial property sales, and business sales to licensed agents exceed the benefits"*. The *NSW Statutory Review of the Property Stock and Business Agents Act* in 2008 also recommended *"that commercial property agents who sell or manage property for a related corporate entity should be exempted from the Property Stock and Business Agents Act."* This followed a recommendation by the NSW Independent Pricing and Regulatory Tribunal in 2006, following its investigation of the burden of regulation in NSW. IPART recommended that the Government consider *"exemptions from requirements for commercial property agents who are managing the property of a related company"*.

The need for such an exemption has also been recognised at the national level. In the deliberations in relation to the (then) proposed national license for real estate agents, the *Decision Regulation Impact Statement: Proposal for national licensing for property occupations* ("the Decision RIS") in July 2013 noted *"an exemption from engaging a licensed real estate agent for non-residential property transactions between related entities has received full support from industry"*. The RIS therefore proposed *"an exemption from the requirement to hold a real estate agent's licence or agent representative registration for non-residential property transactions between related entities"* (p.29).

Despite this constant recognition that entities which buy, lease or manage properties on behalf of a related entity should be exempt from the relevant state or territory estate agents legislation, Queensland is the first state to take action to correct this costly anomaly. The decision by COAG on 13 December 2013 not to proceed with the National Occupational Licensing System (NOLS) means it is even more important for the Queensland Government to proceed with the exemptions proposed in Clause 7 and Clause 8 of the Bill. The same COAG meeting noted in the Communique that "all governments agreed to work in their own jurisdictions to improve regulation and remove unnecessary red tape". The exemptions proposed in the Bill are a concrete demonstration of the Queensland Governments commitment to this COAG decision.

We therefore strongly support Clause 7 of the Bill which will lead to a significant reduction in unnecessary business red tape in Queensland.

3. Clause 8. Exemption for agents managing on behalf of large property owners

The fact that there are risks in commercial real estate transactions – as there are in all business-to-business transactions – does not mean that such transactions should be regulated by governments (in this case by means of licensing and compliance with PAMDA and its replacement). This is most certainly true for financially sophisticated property owners who fully understand the risks involved in property transactions.

A 'related entity exemption' under Clause 7, while being a significant advance in removing unnecessary and costly business regulation, is not in itself sufficient to remove burdensome regulation. Some large property owners, who do their own management through a related entity, will be free of the cost of licensing requirements and associated regulation. Other major property owners, who choose to use an external agent for the management of their properties, would still ultimately bear the cost of unnecessary licensing requirements and regulation.

As an example, one of our members (which owns five large shopping centres in Queensland, including three in Brisbane, and is also a major owner of shopping centres and office property in other States) would be at a disadvantage in the management and leasing of its shopping centres because it engages an independent shopping centre manager (and therefore ultimately bears the costs of continuing regulation) compared to a competitor shopping centre owner which manages through a related entity. Another of our members, which uses external property agents to manage a number of its office properties in Queensland, including in Brisbane, would also be at a disadvantage compared to a competitor which manages its own office properties though a related entity. This obviously makes no sense.

Large shopping centre owners, and large owners of commercial property, are not ordinary consumers who need or want legislative protection. Property ownership is their business and they employ large staffs to ensure their interests are protected. Their relationship with their property manager (agent) is a professional, business-to-business relationship, not a business-to-consumer relationship. The have recourse to legal and commercial avenues if a property transaction goes wrong. The risks in the owner-agent relationship should therefore be a matter for commercial negotiation between the parties, not a matter for regulation by government.

There are legislative precedents, at both the state and national level, for treating certain persons as 'sophisticated consumers' who do not require legislative protection. In the regulation of retail leases in Queensland, for example, those retailers which are public companies and whose shop footprint exceeds 1,000 square metres, are considered to be sufficiently large as to not require the protection of the *Retail Shop Leases Act* in their negotiations with their landlords. (Similar thresholds also apply in retail tenancy legislation in other States and Territories). Similarly, in Western Australia a 'sophisticated borrower' is exempted from certain legislated protections in the *Finance Brokers Control (Code of Conduct) Regulations.* A 'sophisticated borrower' is a "*person who regularly engages in and is conversant with loans of money (secured or unsecured) and by the person's experience over a reasonable period of time, may be expected to fully appreciate and understand the risks involved and their consequences*". Such a 'sophisticated borrower' must have net assets of at least $2.5 million or have a net income for each of the last two financial years of at least $250,000 a year.

Nationally the *Corporations Act* recognises that some investors are 'sophisticated investors' who do not require certain disclosure protections that are required for ordinary retail investors. A sophisticated investor is deemed to have sufficient investing experience and knowledge to weigh the risks and merits of an investment opportunity without regulated protection. A 'sophisticated investor' must have net assets of at least $2.5 million, or have had a gross income of $250,000 or more in each of the previous two years. The *Corporations Act* also defines a 'professional investor', who is also exempted from various regulatory protections, as a person with net assets of at least $10 million.

The Bill provides in Clause 8 that certain property owners should be acknowledged, in effect, as 'sophisticated' property owners, that is, owners who regularly engage in property management, leasing and sales and who therefore understand the risks and consequences that may be involved in such transactions. Such a 'sophisticated consumer' need not engage a licensed real estate agent to manage, lease or sell their property.

The principle of such a 'sophisticated consumer' exemption was also acknowledged in the Decision RIS: *"The risks in large non-residential property transactions appear to be adequately managed through the general sophistication of clients and trajectories, such as legal contracts and agreements. Licensing would be unnecessary for this sector as owners of multi-million dollar commercial properties would most likely be professional property investment companies. These companies would be conversant in the business of understanding the risks of owning and investing in non-residential property assets. An exemption would mean that there would be no requirement to go through a licensed real estate agent for very large non-residential property transactions." (p.28).*

We therefore strongly support Clause 8 of the Bill which will also lead to a significant reduction in unnecessary business red tape in Queensland.

4. Regulations

Clause 8 of the Bill provides that the thresholds relating to 'total gross floor area' and 'total estimated value' will be prescribed by regulation. While it is unlikely that the 'total gross floor area' threshold will be diminished over time (just as, for example, the 1,000 square metre threshold in the *Retail Shop Leases Act* has not been affected over time) it is possible that the 'total estimated value' will be affected by the inflation of property values over time. We therefore support the nomination of these amounts by regulation.

We would point out, however, that the most relevant threshold for determining whether or not buying, selling, leasing or management of real property will be exempt from the Act will be the 'total gross floor area' thresholds in Clause 8.

We support the thresholds for exemptions nominated in Clause 8 of the Bill being set by reference to a regulation.

5. Tenants would be unaffected by the exemptions being sought

It is occasionally claimed that the PAMDA (and, presumably, the forthcoming *Property Occupations Act*) needs to continue to regulate agents managing on behalf of large property owners and even related entity property owners because the PAMDA also protects tenants. According to this argument, an agent (acting on behalf of an owner) could be found guilty under the misconduct provisions if they engaged in misconduct. However, this argument does not explain how this action would provide relief to a tenant (as opposed to an owner). Nor does it explain what protection is offered to those tenants of a property whose owner handles property management directly (not through an agent) and who is therefore not regulated by the Act.

Retail tenants are directly protected against actions of landlords (and their agents) by the *Retail Shop Leases Act,* not by the PAMDA or the Bill. The *Retail Shop Leases Act* (which is currently being reviewed by the Queensland Government) provides minimum lease protections for a tenant in a wide range of areas beginning even before a lease is signed. If the lease does not meet these minimum protections, the Act overrides the provisions of the lease. The *Retail Shop Leases Act* also provides low-cost mediation of retail tenancy disputes.

The *Retail Shop Leases Act* also specifically provides:

- Section 22 – that a tenant who was not given a disclosure statement, or given a disclosure statement that was incomplete or false or misleading, may terminate the lease within 6 months of it being entered into;
- Section 43 – a right to compensation for a tenant as a result of a range of actions being taken by a landlord or an agent;
- Division 8A – unconscionable conduct provisions (drawn down from the *Competition and Consumer Act*).

The claim that the PAMDA is a protection for tenants is wrong. The Queensland Parliament would not have passed the *Retail Shop Leases Act* if the PAMDA was a protection for tenants.

6. Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents the major owners, managers and developers of shopping centres. Our members own more than 100 shopping centres in Queensland. In addition our two independent shopping centre manager members, Jones Lang LaSalle and Savills, are responsible for the management of other shopping centres in Queensland which are not owned by SCCA members.

Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, Colonial First State Global Asset Management, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

The Shopping Centre Council would be happy to appear before the Committee to elaborate on any aspect of this submission. Please do not hesitate to contact:

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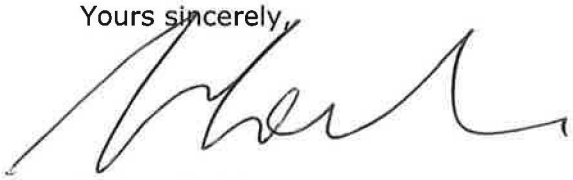
Yours sincerely,



Milton Cockburn
Executive Director

Appendix 1

Cost of regulation and licensing

Last year the SCCA surveyed a sample of our members to establish the annual costs of the requirements of licensing and other obligations of the various Estate Agents Acts around Australia. We asked these members to quantify the costs of annually renewing qualifications; continuing professional development; and the auditing of real estate trust accounts. This information, and the basis on which costs were apportioned (including employee time), was included as an Appendix to our submission on the *Consultation Regulation Impact Statement: Proposal for national licensing for property occupations*. We are happy to supply a copy of this to the Committee if necessary.

We did not attempt in these calculations to assess the costs of a range of other unnecessary requirements including the plethora of rules on the signing of cheques, receipts and the collection and banking of rents; the establishment and maintenance of separate trust accounts in each state; and the organisational restructuring and organisational inefficiencies often necessary to meet state licensing requirements. Nor did we include in these costs the amount of interest 'foregone' by property owners as a result of interest from the trust accounts being directed into the statutory interest accounts (the claim fund in Queensland), instead of being money earned by the property owner.

Nor did we seek to quantify the management time involved in implementing and overseeing systems to ensure compliance with the legislation. This includes the following: identifying who requires a licence/salesperson certificate (which can be difficult as both roles and people change); maintaining an up-to-date register of people and roles; organising a basis level of training for all affected employees; ensuring directors of the property management entity hold licences where required; and reporting to the board of the property management entity on all of these issues.

These additional requirements and consequences of regulation add considerably to the costs we have directly measured.

[Nor, incidentally, do these costs take into account the additional costs to the commercial property industry of being required to upgrade to a diploma level the qualifications of future real estate staff in Queensland (and in NSW, Victoria and the ACT), if the Real Estate Institute of Australia is successful in its demand for diploma level qualifications for real estate agents. From the RIS data, it can be estimated that this would cost the real estate industry in these jurisdictions up to $15.5 million a year and it can be assumed that Queensland's share of this cost would be around $3 million a year. Similarly the REIA's demand that compulsory continuing professional development requirements be imposed in Queensland (and Victoria, South Australia and the Northern Territory) would, if adopted, add up to $40 million in annual costs in these jurisdictions and it can be assumed that the Queensland's share of this cost would be around $8 million a year.]

On the basis of our sample of members we have estimated, with reasonable accuracy, that the licensing, professional development and trust account regulation requirements alone are currently costing SCCA members around $3.62 million a year. Since SCCA members own around 60% of the total gross lettable area of Australian shopping centres, a reasonable estimate of the cost of this regulation for the Australian shopping centre industry is around $6 million a year.

This cost of $6 million a year is the cost only to the shopping centre sector of the Australian commercial property industry. Since retail property accounts for around 40% of the commercial property industry[1], and office property accounts for roughly a similar proportion, the total cost of licensing and regulation for the commercial property industry would exceed $12 million a year. It can reasonably be assumed that the cost in Queensland exceeds $2.4 million a year.[2]

Where possible, of course, such costs are passed back to the owner of the property through the commissions and management fees they pay. This is particularly frustrating since the only reason these property owners are incurring these costs is to protect themselves against the agent or property manager they have personally chosen, which is often a related corporate entity to the owner, and with whom they have a detailed and legally enforceable commercial contract.

The exemptions from the Act proposed in the Bill would therefore bring major benefits to investors in superannuation funds, real estate investment trusts, managed investment trusts, life insurance funds and other investment vehicles. Such investors are mainly people who are saving for, or living out, their retirement.

These exemptions would also free up government staff resources currently occupied in licensing, compliance and enforcement. This is an important consideration at a time when Queensland, like all state governments, is struggling to control its budget. Most importantly this reform would come at no significant cost to the community.

[1] *David Higgins, Nadia Ditrocchio, Nathan Hughes 'Mapping the Australian Property Investment Universe' RMIT 2008*

[2] Using the proportion of the Queensland population to the Australian population

Appendix 2

Correcting an accident of history

Two questions should be asked when considering whether work relating to the buying, selling, management and leasing of non-residential real property should be regulated by governments. The first is: "if state governments were moving today to regulate the activities of real estate agents in order to protect the interests of property owners, as they were in the 1940s and 1950s when the various Estate Agents Acts[3] were being introduced, would those governments have considered as an act of policy that the interests of commercial property owners needed to be protected and therefore regulated?

The second is: "would those governments have considered that the interests of financially sophisticated property owners, who have accumulated millions of dollars of commercial property and who fully understand the risks involved in property transactions, needed to be protected and regulated?" The answer to both questions is unequivocally "no".

The coverage of commercial property by the various Estate Agents Acts is an accident of history, not a deliberate public policy decision. When state governments first began regulating real estate agents after World War 2 they were concerned with protecting individuals dealing with their local real estate agents to buy, sell or rent their house. These home owners generally knew little of real estate practices and could be vulnerable to an incompetent or dishonest agent. So the governments started licensing real estate agents to ensure they had the requisite skills, education and 'good character' to minimise the chance that they might take advantage of a client. The governments also introduced numerous rules on how real estate agents should operate, again in an attempt to protect home owners against incompetent or unscrupulous agents. These rules govern everything from the signing of cheques and the collection of rent to the establishment of trust accounts. The governments also set up statutory funds, funded by agents and property owners, to compensate people who lost money because of actions by their real estate agents.

Through the intervening years governments have continued to regulate real estate agents on this basis. Over this period, however, enormous changes have taken place in Australia's commercial environment and the nature of commercial property ownership has changed dramatically. Today's commercial property market is characterised by large companies, real estate investment trusts, superannuation funds, property syndicates and managed investment schemes which own and invest in property across state and national borders. Many of today's large professional property owning companies, such as QIC and Westfield, did not exist when the Queensland Parliament first began regulating the activities of property agents.[4]

If such companies had existed then, and certainly if they had existed in the scale they have today, it is inconceivable that legislators would have decided that such companies needed legislative protection if they engaged an agent to manage their properties. Yet this is the absurd situation we find ourselves in today.

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[3] *These Acts have different titles in each State, such as the Property Agents and Motor Dealers Act in Queensland, the Property, Stock and Business Agents Act in NSW and the Estate Agents Act in Victoria.*

[4] *The PAMDA was preceded by the Auctioneers and Agents Act 1971 which, in turn, was a consolidation of various other pieces of legislation regulating the activities of auctioneers, real estate agents, debt collectors and motor dealers.*

The 'consumers' being protected by the PAMDA and the forthcoming Property Occupations Act are in many cases large national and multinational entities and the relationship between the owner and agent/manager is a commercial, business-to-business relationship where all parties are professionals and fully informed. Indeed, many property managers in this sector are related corporate entities of the property owner. These owners do not need a statutory fund to compensate them if their arrangements with their agents fail but, by historical accident, these owners and managers remain within the purview of regulation designed to protect non-professional owners and buyers of residential property.

In the commercial property market, where properties can be worth hundreds of millions of dollars, property managers and agents negotiate a comprehensive management agreement tailored to the property in question and setting out in detail accounting and audit requirements, the obligations of the property manager, and the requirements for fidelity guarantee insurance and professional indemnity insurance. Significant resources are applied by both parties to ensure these agreements are thorough and comprehensive and in line with the scale and extent of transactions undertaken in the commercial property market. The scope of these agreements extends well beyond the matters addressed in the PAMDA. Given the millions of dollars at stake in the successful management of a shopping centre, these issues are not left to a standardised property management agreement that has been designed with residential property in mind.

If the Queensland Parliament had specifically intended to regulate the activities of the commercial property industry it would certainly have included an exemption, similar to that inserted in the Queensland *Retail Shop Leases Act*, to ensure that the legislation excluded large commercial property owners from the protection of the legislation. The Parliament would also have taken steps to ensure that property agents managing on behalf of a related property owner were not regulated by the relevant legislation. The *Property Occupations Bill 2013* will correct this accident of history.